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In the Supreme Court of the United States

OCTOBER TERM, 196[redacted]

No. [redacted]248

ELLSWORTH F. MONTRIE,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Petitioner herein, Ellsworth F. Montrie, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this matter on January 19, 1966.

OPINIONS BELOW.

Neither the Court of Appeals of the Sixth Appellate District of Ohio nor the Supreme Court of Ohio issued an opinion in this case, but one Judge of the Court of Appeals dissented from the decision affirming the trial court's judgment and filed a Memorandum of Dissent, a copy of which is printed in the Appendix hereto. The Memorandum dealt with an issue not presented in this Petition.

STATEMENT OF JURISDICTION.

The action of the Supreme Court of Ohio dismissing Petitioner's appeal of right and overruling his motion for leave to appeal was announced on December 8, 1965, and became that Court's judgment and was filed on January 19, 1966, on which date Petitioner's motion for rehearing was denied.

On April 19, 1966, this Court, by Justice Potter Stewart, granted an Order extending Petitioner's time to file the within Petition for Writ of Certiorari to and including June 18, 1966. Pending the filing and disposition of the within Petition, this Court has stayed the execution and enforcement of the judgment of the trial court.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3) and this Court's Rule 22 (1) inasmuch as the Ohio courts have denied the Petitioner rights, privileges and immunities guaranteed him under the Constitution of the United States.

QUESTIONS PRESENTED.

When a person is arrested shortly after, and in the immediate vicinity of, the occurrence of an armed robbery and admits his involvement in the crime, is he deprived of rights, privileges and immunities guaranteed by the Constitution of the United States:

(1) when he is subjected to immediate and pervasive police interrogation without having been first informed as to his right to refuse to answer questions or as to his right to the advice of legal counsel?

(2) if, although he is permitted to call his attorney to come to the jail to counsel him, he is nevertheless subjected to such continuing questioning while his attorney is kept waiting for a long period before being permitted to see him or counsel him in private?

(3) if the interrogating police officers are permitted to testify against him at his trial as to conflicting and inconsistent statements made by him during said period of questioning and at a time while he was being prevented from having private consultation with his attorney?

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are that portion of the Fifth Amendment to the Constitution of the United States which reads in part:

> "* * * Nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor * * *."

And that portion of the Sixth Amendment to the United States Constitution which reads as follows:

> "In all criminal prosecutions, the accused shall enjoy * * *, and to have the assistance of counsel for his defense."

And that portion of the Fourteenth Amendment to the United States Constitution which reads as follows:

> "* * * Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATEMENT OF THE CASE.

At the time in question, Petitioner was a married man, 47 years of age. He had been a life long resident of Toledo, Ohio, and was then the owner and operator of a company which manufactured heavy-duty, over-the-road trailers.

Early on a Sunday morning, July 12, 1964, Petitioner was driving around in Toledo attending to some business matters prior to taking the family car home so that the family could attend church. Petitioner testified that he stopped at the home of one John Womack and discussed some matters of business that he had with him. Womack asked Petitioner to drive him to a store and, at Womack's direction, Petitioner took him to a small neighborhood market which had just opened in the vicinity.

Then, as Petitioner testified, Womack displayed two guns and commanded Petitioner to go into the market with him for the purpose of robbing it, forcing one of the guns on Petitioner and pushing him forward into the market. Once inside, Womack went to the back of the store and Petitioner, as he had been instructed by Womack, stopped at the front stand and asked the clerk (the owner's wife) for some gum and then told her to give him the store's

money. The owner of the store, who had been working in the back, attracted by his wife's scream, came running up, tackled Petitioner and held him on the ground. Whereupon, Womack ran up, waving his gun at the storekeeper, intent upon shooting him.

The undisputed and corroborated evidence showed that at this point Petitioner raised the gun Womack had given him and, in an effort to stop Womack's attack on the store owner, pointed the gun at Womack and pulled the trigger. For some unknown reason, the cartridge in the gun failed to detonate. Womack knocked the gun out of Petitioner's hand and used it to beat the store owner.

The store owner was then able to scramble to his feet and barricade himself from further attack by Womack, who was then acting like a crazed person, threatening to put the store owner and his wife in the freezer, tearing out the phone, etc. Meanwhile, Petitioner, greatly frightened, stood quietly by. The store owner's wife then took the money out of the cash drawer and handed it to Petitioner, pleading with Womack to stop hurting her husband and to take the money and leave. As then directed by Womack, Petitioner went to the back of the store, with Womack following behind carrying the only serviceable gun, and went out the back door of the market and ran off between neighboring houses. At the first opportunity, Petitioner stopped and Womack ran off separately.

Petitioner then went by the most direct route to the nearby main thoroughfare and stood on the street corner, as a police car was then drawing up. Without resistance he submitted himself to the police officers. He was asked by one of the officers: "I believe you are a suspect in the grocery store thing." At the trial, this police officer was permitted to testify that Petitioner answered this question by saying: "I guess you got me."

He was then taken to the downtown police station and the same police officer was permitted to testify at the trial that, while enroute, he had asked Petitioner "where he put the gun?" and that the Petitioner had replied that "he lost the gun in the scuffle in the store."

Immediately upon arriving at the police station at about 8:30 A. M., the Petitioner testified that he was asked "a lot of questions * * * by two detectives." He was permitted to call his attorney to tell him he had been arrested and to ask him to come at once to the police station. His attorney arrived shortly thereafter, but Petitioner was not permitted to see him, and, in fact, did not have a private consultation with his attorney until "an hour and a half" after making the call.

During this interval, Petitioner was subjected to grueling interrogation, first alone and then in confrontation with Womack, who had also been apprehended shortly after Petitioner's apprehension. Petitioner testified that during this interrogation and before he was permitted to see his attorney he was "nervous and all shook up * * * they asked me a million questions."

Initially, Petitioner was interrogated alone and he was not informed that Womack had been apprehended. He was asked if he knew Womack and, fearful for himself and his family if he implicated Womack, who, he thought, might have been able to escape, he denied knowing him and gave an untrue story as the identity of his companion and how he had happened to be with him. Later, when confronted with Womack, Petitioner admitted knowing him.

At the trial, the police officers were permitted to testify as to the untrue and contradictory statements of Petitioner concerning Womack which he had made as he was interrogated prior to seeing his attorney.

Nowhere in the record of the trial is there any disclosure that the police officers ever advised Petitioner of his right to remain silent or to first consult with his attorney. On the other hand, the record reveals the following testimony by a police lieutenant who interrogated the Petitioner:

> "Q. Did you advise him (the Petitioner) that he had no duty to answer any questions you asked him?
> "A. I don't believe I did."

At all times and throughout the trial, Petitioner said that all of his acts on that early Sunday morning had been the direct result of Womack's coercion and threats and his own fear of great harm at Womack's hands if he did not comply with Womack's orders. As a corollary, Petitioner relied on a separate defense, approved by the Ohio Supreme Court in an earlier case, that, although a person conspires to commit a crime, if he repents of his purpose and effectively withdraws from the conspiracy prior to its consummation, he can not be found guilty of any of the acts involved. The trial court refused Petitioner's request that the jury be specifically instructed on the law as to this defense.

Petitioner was found guilty of the charge of armed robbery and his motion for a new trial was overruled in the trial court.

HOW FEDERAL QUESTION PREVIOUSLY PRESENTED.

Petitioner appealed to the Court of Appeals of the Sixth Appellate District of Ohio and there specifically brought to the Court's attention the claimed error of the trial court's having permitting the police officers to testify as to his untrue and inconsistent statements made during initial interrogation, prior to his first opportunity to consult with his attorney. Nevertheless, the Court of Appeals affirmed the trial court, without rendering an opinion. One of the three judges dissented upon the basis of the trial court's refusal specially to instruct the jury on Petitioner's corollary defense of "repentance and withdrawal," but no notice was taken therein as to the claimed deprivation of Petitioner's constitutional rights by the use in evidence of the police officers' testimony as above outlined.

Upon appeal to the Supreme Court of Ohio, Petitioner assigned as error the trial court's refusal to instruct the jury on his defense of "repentance and withdrawal" but he also specifically assigned as error and as the constitutional question raised in the case the "deprivation of Montrie's constitutional rights to a fair trial by admission of evidence as to his inconsistent statements made prior to private consultation with his attorney." The Supreme Court of Ohio, without an opinion, denied the appeal and overruled Petitioner's motion for rehearing. Whereupon, the present proceedings were instituted in this Court.

REASONS WHY THIS WRIT SHOULD BE GRANTED.

The facts of this case present this Court with the opportunity to resolve two of the problems that have vexed both Bench and Bar in the wake of *Gideon v. Wainwright*, 372 U. S. 335 (1963); *Massiah vs. The United States*, 377 U. S. 201 (1964) and *Escobedo vs. The State of Illinois*, 378 U. S. 478 (1964):

(1) At what point anterior to the trial is a criminal defendant entitled to counsel?

(2) At what point should a criminal defendant be informed by the police authority of his right to remain silent?

At the trial of the Petitioner, police officers were permitted to testify to inculpatory statements made by Petitioner at three different stages of their interrogation of him.

First, on confronting the Petitioner immediately upon arriving at the scene:

> Officer: "I believe you are a suspect in the grocery store thing."
> Petitioner: "I guess you got me."

Second, after Petitioner had been arrested and was enroute to the police station in the patrol car:

> Officer: "Where did you put the gun?"
> Petitioner: "I lost the gun in the scuffle in the store."

Third, upon arriving at the police station Petitioner was asked "a lot of questions * * * by two detectives." It was at this session of interrogation, while Petitioner was "nervous and all shook up" and being subjected to "a million questions," that he gave an untrue statement as to his knowledge of his companion, Womack, which statements he corrected shortly thereafter when he learned that Womack was also in custody. These contradictory

admissions were later used to impeach his credibility at the trial.

At no point was Petitioner advised by the police officers of his constitutional right to remain silent and it was not until after the second incident that Petitioner was permitted to call his lawyer. He was not permitted to consult with him, however, until after the third incident.

There is no longer any question that the right to counsel as expressed in the Sixth Amendment of the United States Constitution and defined by this Court are applicable to criminal proceedings before State as well as Federal courts. *Gideon vs. Wainwright, supra; Massiah vs. The United States, supra; Escobedo vs. The State of Illinois, supra,* and *Pointer vs. The State of Texas,* 380 U. S. 400 (1965).

Further, under *Mapp vs. The State of Ohio,* 367 U. S. 643 (1961), it is certain that any incriminating evidence elicited from a suspect subsequent to the denial of a constitutional right may, upon proper motion, be excluded in the trial of a criminal case in a state case despite any probative value it may have and without regard to whether or not the evidence was given voluntarily or involuntarily.

The legal issue presented by the facts of this case, therefore, is whether the Petitioner was denied his right to remain silent and his right to counsel as defined by the Fifth and Sixth Amendments to the United States Constitution. Had the Petitioner incriminated himself without being advised of his rights and without benefit of counsel *after* he had been indicted or during a pretrial hearing at which his plea was taken or statements made which could otherwise be used against him in a subsequent criminal trial, such evidence would be subject to the exclusionary rule of this Court, again regardless of the probative value

of the evidence or without regard to whether it was voluntarily obtained. *White vs. The State of Maryland*, 373 U. S. 59 (1960); *Hamilton vs. The State of Alabama*, 368 U. S. 52 (1961); *Gideon vs. Wainwright, supra; Massiah vs. The United States, supra; Escobedo vs. The State of Illinois, supra;* and *Pointer vs. The State of Texas, supra.*

Mr. Justice Goldberg in *Escobedo vs. The State of Illinois, supra,* stated at 492:

> "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances, here, the accused must be permitted to consult with his lawyer."

In the case at bar, the investigatory phase coincided with the accusatory phase. The Petitioner was accused by the police officer at the outset of the investigation. The "focus" of the investigation was centered on the Petitioner and at that point he uttered an inculpatory statement heedless of his right to remain silent and without any warning from the officer that his statements could be used as evidence against his at a trial.

The decision of this Court in the *Escobedo* case was bottomed on five relevant factors set out in the opinion at 490:

> "(1) the investigation is no longer a general inquiry into an unsolved crime but has begun to focus upon a particular suspect,
>
> "(2) the suspect has been taken into police custody,
>
> "(3) the police carry out a process of interrogations that lends itself to eliciting incriminating statements,
>
> "(4) the suspect has requested and been denied an opportunity to consult with his lawyer, and

"(5) the police have not effectively warned him of his absolute constitutional rights to remain silent * * *." (Numbers in parentheses added.)

The first statement of the police officer to the Petitioner accused him of being involved in a crime, thus from the beginning the focus was on the Petitioner who had no warning that he had the right to remain silent. Although at this point he was not technically in custody, he nevertheless would have faced restraint had he attempted to leave the presence of the officer. He had not requested nor had he been denied the assistance of counsel at this point, but neither had he waived his right to counsel.

Mr. Justice White in his dissenting opinion in the *Escobedo* case points out at 495 that

"At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel."

If Mr. Justice White's evaluation of the holding in the *Escobedo* case is accepted, then the officer's testimony of the first self-incriminating statement made by the Petitioner would be inadmissible.

With respect to statements made by the Petitioner at the later stages in the patrol car and at the police station in the process of interrogation, there can be no question that these come squarely within the prohibition of the *Escobedo* ruling as the circumstances on those occasions satisfy all five of the criteria set out by Mr. Justice Goldberg in his opinion.

In view of the legal consequences which derived from the admissions made by Petitioner, the critical stage of the interrogation process in this case was reached immediately

upon the first police officer's confronting the Petitioner and making an accusation. The Petitioner thereupon became the prime suspect and the "adversary system," adverted to at 492 in the *Escobedo* opinion, began to operate. It is at this juncture that the prime suspect must be informed of his rights to remain silent and to counsel, if the constitutional guarantees are to be effective.

The conclusion is ineluctable that the language of Mr. Justice Goldberg in the *Escobedo* case implies that the right to remain silent and the right to counsel attaches to a person the instant the interrogation process focuses upon him as a prime suspect in a criminal case and any incriminating evidence elicited from him thereafter in the interrogation process is subject to exclusion at the trial of his case despite its probative value and irrespective of its voluntary aspect.

The effectiveness of counsel retained or assigned after interrogation procedures have been in progress for a time is negated if the statements made in the interim by a suspect unaware of his right to remain silent are admitted into evidence at his trial. The right guaranteed by the Sixth Amendment is thereby rendered meaningless. Effective protection of the Fifth Amendment right lies in the guarantee of counsel provided by the Sixth Amendment.

To place a narrow and highly restrictive interpretation on the holding in the *Escobedo* case would retard the administration of justice in criminal matters. If the rights guaranteed by the Fifth and Sixth Amendments are to be meaningful, then all suspects should be apprised of the right to remain silent and to have counsel at the outset of the interrogation process. The police should not be permitted to obtain inculpatory admissions and then advise the suspect of his right to counsel and of his right to have remained silent when the accusatory question was put to

him. The police must obtain their evidence and establish their case independently of any admission or confession.

The prevention and investigation of crime is admittedly a major problem, but its solution does not lie in a narrow and overly-restrictive reading of cases interpreting the Constitution. What is needed is the development of novel and more imaginative methods of criminal investigation.

If the right to remain silent and the right to have counsel are to be effective safeguards of freedom in the context of an adversary system, then such rights must attach immediately prior to a person's interrogation by the police authority and, further, if evidence is obtained in violation of these rights, it shall be inadmissible at a subsequent criminal trial.

CONCLUSION.

Unless this Court determines the point at which the right to remain silent and the right to counsel attaches, the administration of justice in the United States will be seriously handicapped. There must be a determination of the point when a criminal prosecution begins.

The facts of this case, wherein the accusatory phase begins at the initial point of the interrogation process and precedes or coincides with the investigatory phase, present the Court with an opportunity to define the precise point at which the rights of a person under the Fifth and Sixth Amendments to the Constitution become effective.

For these reasons it is urged that the writ be granted.

Respectfully submitted,

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Attorney for Petitioner.

Of Counsel:

RICHARD H. CONN,
MERRITT W. GREEN.

APPENDIX.

MEMORANDUM OF DISSENT.

(May 12, 1965.)

BROWN, *J.* The conviction of the defendant for armed robbery by the jury in this case should be reversed, and a new trial granted, because the trial court refused to include in the general charge any instructions on the defense of repentance and withdrawal. The trial court was requested before final arguments by the defendant to give special instructions on the defense of duress and on the defense of repentance and withdrawal, and the court did, in the general charge after final arguments, charge sufficiently on the defense of duress but not a word about the defense of repentance and withdrawal.

In a criminal case when the evidence is concluded either party may request instructions for the jury on any points of law, and it's not necessary that the request be renewed after argument. *Grosswiler v. State,* 113 Ohio St. 46; 15 *O. Jur.* 2d 742, Sec. 575, Criminal Law. By statute, when the evidence in a criminal case is concluded either party may request instructions to the jury on the points of law, and the court is required to charge the jury after the argument is concluded. R. C. 2945.10, paragraphs E and G. Under R. C. 2945.10 it is not mandatory to give the instructions to the jury before argument, but, if requested special instructions, reduced to writing, are correct, pertinent and timely presented, they must be included, at least in substance, in the general charge. *State v. Barron,* 170 Ohio St. 267; *Curtis v. State,* 113 Ohio St. 187; *State v. Good,* 110 O. App. 415; 15 *O. Jur.* 2d 739, 744, Sections 573 and 577, Criminal Law. It is prejudicial error in a criminal case to refuse to give a requested charge which is pertinent to the case, states the law correctly

and is not covered by the general charge. 15 *O. Jur.* 2d 744, Sec. 578.

The defense of repentance and withdrawal, if proven by the defendant by preponderance of the evidence, is a sufficient defense under the law of Ohio. *State v. Sappineze,* 84 Ohio St. 63; *State v. Milan,* 108 O. App. 254; 15 *O. Jur.* 2d 272-3, Criminal Law, Sec. 35.

The State contends that the defense of repentance and withdrawal contradicts, and is inconsistent with, the defense of duress and coercion which defendant supported by his own testimony.

However, such reasoning and conclusions proceed on the theory that the proof of any defense, or its existence, depends entirely upon the testimony and claims of the defendant alone and not upon a consideration of all the testimony of all the witnesses in the case. It ignores the well established rule that the jury may believe and accept as true, or disbelieve and reject, all or any part of the testimony of any witness or party. This correct rule concerning credibility of witnesses was recognized by the trial court in the instant case in its general instructions thereon at R. 161 where the trial judge stated:

> "* * * You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief according to the weight you assign to the testimony of each witness * * *."

In accordance with this rule as to credibility of witnesses, applying it to the defense of repentance and withdrawal, the defendant had the right to have the jury instructed thereon so that the jury might disbelieve Montrie's disavowal of any preliminary conspiracy with Womack to rob the Evergreen Market and might instead be-

lieve Womack that the defendant helped plan the robbery and had voluntarily and of his own free will walked into the Evergreen Market with a gun under his coat intent upon robbing it with Womack, and then after entry into the Market, the jury might believe defendant's testimony, including corroboration by several witnesses concerning defendant's pointing the gun at Womack, that he repented of his plan to rob and attempted to withdraw from the crime after that point, but that his acts of apparent participation in taking the money and fleeing the Market were a result of coercion and fear of Womack who had the only functioning weapon at that time. The jury was not permitted to consider the evidence under this theory because of the refusal of the trial court to charge on the law of repentance and withdrawal.

The argument that the defendant should have no right to two defenses, and jury instructions thereon, which seemingly contradict each other, is without merit. Seemingly inconsistent and contradictory defenses should be permitted in criminal cases just as readily and for reasons similar to their availability and use in civil cases for money judgments. 43 *O. Jur.* 2d 141, Sec. 124, Pleading. For example, in civil actions for money judgment on a promissory note or on a contract, the defendant may plead a denial of signing the note and an affirmative defense that, if signed, the signature was obtained by fraud; or may plead a defense of want of consideration for the note and a denial of execution and delivery; or may plead denial of execution of a contract alleged and a second defense admitting its existence coupled with a claim that its terms have been fully performed by the defendant; or may plead denial of making a contract and a second defense of the statute of frauds. *Pavey v. Pavey*, 30 Ohio St. 600; *Citizens' Nat. Bank v. C. N. O. & T. P. R. Co.*, 9 O. Dec. Rep. 147; *Palmer*

v. Humiston, 87 Ohio St. 401; *McCulloch v. Tapp*, 2 O. Dec. Rep. 678.

These four cited examples in civil cases each involve two defenses which contradict, and are inconsistent with, each other and there is just as much, or perhaps more, reason for permitting in a criminal case the assertation of any and all defenses that are relevant to, and fit, any aspect of the evidence in the case, no matter how contradictory of each other the defenses appear to be.

/s/ BROWN, J.

JUDGMENT ENTRIES OF THE SUPREME COURT OF OHIO.

As to Petitioner's motion for leave to appeal from the Court of Appeals: "It is ordered by the Court that this motion is overruled."

As to Petitioner's appeal from the Court of Appeals as of right: "This cause, here on appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court *sua sponte* dismisses the appeal for the reason that no substantial constitutional question exists herein."

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No. 248

In the Supreme Court of the United States

ELLSWORTH F. MONTRIE,	:	October Term, 1966
Petitioner	:	U.S. S.C. No. 248
-vs-	:	O.S.C. No. 39779
STATE OF OHIO,	:	C.A. No. 5920
Respondent	:	C.P. No. 42664

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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ELLSWORTH F. MONTRIE,	:	October Term, 1966
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Respondent	:	C.P. No. 42664

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

HISTORY OF THE CASE

Ellsworth Frederick Montrie was indicted by the Lucas County Grand Jury of August 6, 1964, for the violation of Section 2901.13 of the Ohio Revised Code, Armed Robbery, together with an accomplice, John Thomas Womack. The Court ordered separate trials for the petitioner and Womack. The petitioner was arraigned on August 11, 1964. At a pre-trial conference on August 25, 1964, the petitioner asked for a continuance for further pre-trial which was granted by the Court.

At a pre-trial conference on October 1, 1964, the case against the petitioner was set for trial on November 18, 1964. Said cause went to trial and on November 20, 1964, the jury found the petitioner guilty as charged in the indictment. The motion for a new trial was held and overruled on